

A part-time, on-call claimant was entitled to have her claim pre-dated to the Sunday of her first week of total unemployment, because her employer failed to provide her with written information about filing a claim for unemployment benefits, as required under G.L. c. 151A, sec. 62A(g). She was not required to provide good cause under G.L. c. 151A, sec. 23.



THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW

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## Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to deny the claimant her request to pre-date her claim for unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

When the claimant filed her claim for unemployment benefits on April 30, 2008, she requested that her claim be pre-dated to an earlier date. In a determination dated February 26, 2009, the DUA denied her request to pre-date the claim. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's determination denying the claimant's request to pre-date her claim, in a decision rendered on April 3, 2009. We accepted the claimant's application for review.

The review examiner determined that the claimant was not entitled to an earlier effective date, because the claimant had not shown good cause under G.L. c. 151A, § 23(b). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to make further subsidiary findings from the record concerning whether the employer had provided written information about filing an unemployment claim, as required under G.L. c. 151A, § 62A(g). Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the consolidated findings.

The issue on appeal is whether the claimant, a part-time on-call worker, was entitled to pre-date her claim to cover weeks when she received no work and was totally unemployed but had not yet filed an unemployment claim, because her employer failed to provide her with the written notice on how to file a claim required under G.L. c. 151A, § 62A(g).

## Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant had full-time employment until November of 2006. The claimant began working part-time, on call, as a driver for the instant employer in May of 2007.
2. The claimant would receive her hours of work when being contacted by the dispatcher with an assignment. The claimant's hours normally ranged from eight hours to forty-eight hours per week, depending on the needs of the employer.
3. The claimant was working for the employer on a consistent basis until December 23, 2007. Thereafter, the claimant was not provided with any hours of work from the employer in January 2008. The claimant was provided with 9.96 hours of work with the employer for the month of February 2008, 29 hours for the month of March 2008 and 38 hours for the month of April 2008.
4. At no time did the employer provide the claimant with any written information regarding filing a claim for unemployment benefits.
5. The claimant did not contact the Division to inquire as to whether she could file a claim for unemployment benefits when her hours decreased with the employer. The claimant believed that she could not file a claim for unemployment benefits unless she was separated from employment.
6. The claimant had previously filed a claim for unemployment benefits in 2004 and 2006 when she had permanently separated from employment.
7. In April 2008, the claimant was informed by an acquaintance that she could file a claim for unemployment benefits. That same week on April 30, 2008 the claimant contacted the Division by telephone and filed her new claim for unemployment benefits. The effective date of the claim was the week beginning April 27, 2008.
8. The claimant requested a pre-date of her claim for unemployment benefits.



9. On February 26, 2009 the claimant was issued a Notice To Claimant of Denial of Predate, Form 0323, indicating that in accordance with Section 23(b), the claimant's request for a pre-date was denied because 'your reason for not contacting this office to file your claim until 04/30/208 does not constitute good cause. Therefore, your claim is effective as indicated above.' The effective date of the claim filed was the week beginning April 27, 2008. The claimant filed an appeal to that determination on March 4, 2009.

## Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The review examiner's findings show that the claimant did not receive any hours of work during the period between December 23, 2007 and the end of January, 2008, and that she received only a scattering of hours in February, March, and April, 2008. She first filed an unemployment claim on April 30, 2008. At no time did the employer provide the claimant with the written notice instructing her how to file a claim for benefits, which is required under G.L. c. 151A, § 62A(g). In light of these facts, we conclude that the claimant is automatically entitled to have her claim pre-dated to the Sunday of her first week of total unemployment. We come to this conclusion based on the following analysis.

Pre-dates of unemployment insurance claims are controlled by G.L. c. 151A, § 62A, which provides, in pertinent part, as follows:

(g) ...Each employer shall issue to every separated employee, as soon as practicable, but not to exceed 30 days from the last day said employee performed compensable work, written information furnished or approved by said division which shall contain...instructions on how to file a claim for unemployment compensation... Delivery is made when an employer provides such information to an employee in person or by mail to the employee's last known address. The waiting period under section 23 for an employee who did not receive the information required by this paragraph and who failed to file timely for benefits, shall be the Sunday of the initial week such employee would have been eligible to receive unemployment compensation. Each employer shall have the burden of demonstrating compliance with the provisions required herein. (Emphasis added.)

Critical to an understanding of this section are the meaning of the terms "separated" and "eligible to receive unemployment compensation." There is no statutory definition of the term "separated," but it has been defined by judicial interpretation to mean a time when a worker who wants to work and is available to do so has no work and is not being paid. See Dir. of the

Division of Employment Security v. Fitzgerald, 382 Mass. 159, 163 (1980) (worker is 'severed' from employment and therefore eligible for benefits when these circumstances exist). See also Costelas v. Dir. of Division of Unemployment Assistance, Civil Action No. 0854 CV 1723, (Dedham Dist. Ct., 2009) (worker is "separated" for the purposes of G.L. c. 151A, § 62A(g), on same basis).

Workers become "eligible to receive unemployment compensation" when they are in either "partial" or "total unemployment." The term "total unemployment" is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

"Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work....

The claimant worked for her employer on and off between early 2008 and late April, 2008, when she filed her claim. However, she was nonetheless separated and in total unemployment "in the plain sense that she was out of a job and earning nothing" during each of those weeks when she was not provided with any hours of work. Fitzgerald, 382 Mass. at 163. Therefore, the claimant is entitled, under the plain language of G.L. c. 151A, § 62A(g), to have her claim predated to the first week of her total unemployment<sup>1</sup>. There is no need under this section for a claimant who has not received the required notice to also show any form of "good cause" for not filing her claim at the earliest point when she would have been eligible, and we decline to read such an additional requirement into it.

The review examiner's decision is reversed. The claimant's unemployment claim, first filed on April 30, 2008, shall be pre-dated to Sunday, December 23, 2007, the first week in which she was totally unemployed.

**BOSTON, MASSACHUSETTS****DATE OF MAILING - January 14, 2011**

/s/

John A. King, Esq.  
Chairman

/s/

Sandor J. Zapolin  
Member

/s/

Stephen M. Linsky, Esq.  
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT  
(See Section 42, Chapter 151A, General Laws Enclosed)**

**LAST DAY TO FILE AN APPEAL IN COURT – February 14, 2011**

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<sup>1</sup> We recognize that the claimant, as a part-time on-call employee, is eligible for benefits only during those weeks when she was in total unemployment. Town of Mattapoisett v. Dir. of the Division of Employment Security, 392 Mass. 546, 549 (1984). However, the issue of which weeks she worked some hours and was therefore not eligible for benefits is a wholly separate question from whether she should be able to have her claim predated to cover those weeks when she did not work.